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No. 99-___

In The

# Supreme Court of the United States

ELEUTERIO GARCIA,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Where the defendant in a criminal case asserts an entrapment defense and shows that he was induced by a government agent to commit the crime, can evidence of a defendant's conduct weeks and months after his initial contact with the government agent be used to show that the defendant was predisposed to commit the crime before he came in contact with the government agent?

2. Is the entrapment standard established in *Jacobson v. United States*, 503 U.S. 540, 548 (1992), violated where a conviction is supported only by evidence of conduct that was induced by weeks and months of contact with a government informant?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to this case are Eleuterio Garcia and the United States. When commenced, this criminal action included two co-defendants: Rafael Chavez and Dagoberto Torres.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled action on July, 7, 1999.

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit, entered on July 7, 1999, is reported at 182 F.3d 1165, and is reprinted in the Appendix hereto at pages 1 through 24.

## BASIS FOR JURISDICTION

The Judgment and Opinion of the court of appeals was entered on July 7, 1999. This petition for writ of certiorari is filed on October 5, 1999, within 90 days of July 7, 1998. *See* Sup. Ct. R. 13. This court has jurisdiction to review the final judgment of the court of appeals under 28 U.S.C. §1254(1).

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the federal common law defense of entrapment. *See Jacobson v. United States*, 503 U.S. 540, 553 (1992). Therefore, there are no statutory or constitutional provisions involved.

## STATEMENT OF THE CASE

### A. Facts.

#### 1. The Defendant Is A Successful Mexican-American Businessman.

Eleuterio Garcia came to the United States in 1966 and worked his way from cleaning yards to owning and operating three successful construction businesses. Despite little formal education and a limited command of the English language, he became a prominent member of the Las Cruces, New Mexico business community. Not surprisingly, prior to his arrest in this case, Garcia had no criminal record, and no prior involvement in using or selling narcotics.

#### 2. The Government Informant Is A Career Criminal.

In 1969, Saul Horcasitas entered the United States illegally and soon began smuggling other illegal aliens into the country. In 1984, he was sentenced to 6 months in prison, and escaped while serving that sentence. In 1986, he was captured in Colorado. Desperate to stay in the United States and later fearing that he would be in danger if he returned to Mexico, Horcasitas has maintained a tenuous hold on the privilege of staying in the country by arranging sting operations on behalf of various government agencies (including the federal Drug Enforcement Agency). In exchange, these government agencies not only pay Horcasitas for each arrest he arranges but also have interceded with the INS to keep Horcasitas in the country.

Over the years, Horcasitas has established a method of operation in which he befriends people and gains their trust, then asks them to sell him drugs with the idea of making them the target of a sting operation. Despite a complete lack of law enforcement training or instruction on the law of entrapment or how to avoid entrapping innocent people, Horcasitas picks the targets out on his own, gets the target committed to participating in a drug transaction, then seeks out a law enforcement agency willing to pick this fruit that he has carefully cultivated.

### 3. The Government Informant Befriended The Defendant And Induced Him To Find Someone To Supply Drugs For A "Controlled Buy".

In early September, 1995, Horcasitas and his family moved into a mobile home owned by Garcia. Although Garcia had given no indication that he was involved with narcotics, Horcasitas befriended Garcia and his family in an effort to induce Garcia to participate in a drug transaction.

Weeks after Horcasitas moved into the Garcia mobile home and began befriending the Garcia family in an effort to set up Garcia as the target of a sting operation, the topic of drugs entered the conversations between Horcasitas and Garcia. At the trial, Horcasitas said Garcia had heard that Horcasitas was selling marijuana and approached Horcasitas to suggest that he might deal in "something better for you if you want to make money." Horcasitas said he told Garcia he knew some people in Kansas who might be interested in buying cocaine. According to Garcia, Horcasitas said he was involved in

transporting cars to and from Kansas, Colorado and Oklahoma, asked if Garcia needed to have anything transported there or back, and then asked if Garcia had any cocaine or marijuana that Horcasitas could transport. Garcia refused, but Horcasitas pestered Garcia repeatedly over the next several weeks in an effort to ensnare Garcia in a drug deal. Garcia rebuffed Horcasitas' overtures throughout October and into November of 1995.

In mid-November of 1995, Horcasitas told Garcia he had some "friends" coming from Kansas to buy cocaine and that he needed a supplier. When Garcia refused to help find Horcasitas a supplier, Horcasitas told him his friends "were coming from Kansas and didn't want to do so for nothing." Horcasitas then told Garcia he (Horcasitas) would look bad in front of his "friends" if Garcia did not help him find someone to supply the cocaine he needed.

On December 1, 1995, Horcasitas had his first meeting with agents from the Las Cruces office of the DEA. Contrary to DEA guidelines regarding the use of informants, the DEA agents never conducted a background check on Horcasitas and never asked Horcasitas if he had done anything to induce Garcia's interest in participating in a drug transaction.

On December 7, 1995, the DEA agents arranged a recorded telephone conversation between Horcasitas and Garcia. Horcasitas told Garcia he had called "up North" and that his friends wanted to know "whether I'm bringing for 5 bundles or for 6." At first, Garcia did not reply. Horcasitas prodded him, "What do you think? Huh?" Eventually, Garcia said, "I don't give a damn." Prodding

Garcia further, Horcasitas asked, "Well, then should I bring for 6?" Garcia said "yeah."

On December 10, 1995, Horcasitas called Garcia and said his "friends" from Kansas had arrived in Las Cruces. He said he urgently needed to find someone to supply the cocaine to sell to them. Garcia said he still had not talked to anybody about it. Garcia then received a telephone call from Rafael Chavez, a former employee who regularly purchased stone from Garcia for his wall building business. Chavez said he wanted to buy some stone, and they arranged a meeting for later that morning.

Horcasitas called during Garcia's meeting with Chavez. Garcia had heard that Chavez used cocaine, and he thought Chavez might be able to supply the cocaine Horcasitas needed. Up to this point, Garcia had been, by Horcasitas' admission, "reluctant to get involved" in the transaction. Garcia now responded more readily to Horcasitas' prompting. Horcasitas said "the papers" (money) would arrive the next day. Garcia said he wanted to look at them, and Horcasitas said he would call as soon as his friends arrived.

After that telephone conversation, Garcia asked Chavez if he knew somebody who could supply the cocaine. When Horcasitas called back later that day, Garcia said he had talked to someone about supplying the cocaine, but he did not know whether they could or would. Horcasitas continued to act nervous and desperate about the situation.

On December 13, 1995, Horcasitas called Garcia and said his "friends" had arrived from Kansas and wanted to

meet with Garcia. Later that day, Chavez called Garcia and told him he would supply the cocaine.

The following morning, Horcasitas called Garcia, and Garcia agreed to meet Horcasitas and his "friends." Garcia met with Horcasitas and the DEA agents. Garcia then met Chavez, who was riding in a truck driven by Dagoberto Torres, the presumed supplier of the cocaine. The three men then met with Horcasitas and the DEA agents and were arrested. A fingerprint analysis of the package containing the cocaine showed that Garcia had never handled it.

At trial, Torres testified that he and Chavez had done at least 12 drug deals in the four years preceding their arrest, and that Garcia had never been involved in any of those transactions.

**B. Proceedings Below.**

An Indictment was filed in the United States District Court for the District of New Mexico on December 15, 1995 charging Garcia, Torres and Chavez with possession of more than 500 grams of cocaine with intent to distribute in violation of 21 U.S.C. §841(b)(1)(B). The district court's subject matter jurisdiction was based on 18 U.S.C. §3231, as this is a criminal action charging an offense against the laws of the United States.

A jury trial was conducted from June 10, 1997 to June 14, 1997. At the close of the government's case-in-chief, Garcia moved for entry of a judgment of acquittal pursuant to Rule 29, Fed.R.Crim.P., arguing that the evidence showed entrapment as a matter of law. That motion was

denied. On June 14, 1997, the jury returned a guilty verdict, and Garcia was remanded into custody. On June 20, 1997, Garcia renewed his motion for judgment of acquittal, and made a motion for new trial, pursuant to Rule 33, Fed.R.Crim.P., again arguing that the evidence showed entrapment as a matter of law. On September 29, 1997, the district court entered a Memorandum Opinion And Order denying the motions. On October 1, 1997, Garcia filed a motion for reconsideration, and on November 3, 1997, the district court entered a Memorandum Opinion And Order denying the motion for reconsideration.

A sentencing hearing was held on December 16, 1997, and on December 29, 1997, the district court entered a Judgment sentencing Garcia to 18 months in prison, with four to five years supervised release, and fining him $1,000.

On January 8, 1998, Garcia filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit challenging his conviction. On February 5, 1998, the United States also filed a Notice Of Appeal challenging the sentence. The court of appeals had jurisdiction under 28 U.S.C. §§1291 and 1294. On July 7, 1999, the court of appeals entered a Judgment and Opinion affirming Garcia's conviction and reversing his sentence.

On September 28, 1999, the district court held a resentencing hearing. Finding additional grounds to support the original sentence it imposed, the court sentenced Garcia to time served. Nonetheless, Garcia remains under

supervised release, and, because of his status as a resident alien, he faces likely deportation if his conviction is not reversed.

## REASONS FOR GRANTING THE WRIT

### THE COURT OF APPEALS' DECISION ALLOWS THE GOVERNMENT TO ENTRAP INDIVIDUALS BY INDUCING CONDUCT REFLECTING A WILLINGNESS TO COMMIT A CRIME BEFORE OFFERING AN OPPORTUNITY, CONTRARY TO THIS COURT'S DECISION IN *JACOBSON V. UNITED STATES*, 503 U.S. 540 (1992).

The tenor of federal entrapment law changed substantially with this court's decision in *Jacobson v. United States*, 503 U.S. 540, 548 (1992). In *Jacobson*, the court overturned the defendant's conviction for receiving child pornography through the mail, because the government had induced the defendant to commit the crime and there was insufficient evidence to prove that the defendant was predisposed to commit the offense before the government contacted him.

The evidence showed that Jacobson had purchased two magazines containing photographs of nude preteen and teenage boys at a time when such purchases were legal. After a law was passed making the receipt of such materials a federal offense, postal inspectors found Jacobson's name on the mailing list of the bookstore that had sent him the magazines. Over the next 2½ years, undercover investigators for the Postal Service and the Customs Service made repeated mailings to Jacobson, which

included fictitious surveys about his views on pornography and exhortations about sexual freedom and the right to buy pornography. Eventually, an agent for the Customs Service sent Jacobson a letter suggesting that pornographic materials could be received from overseas and asking Jacobson to send for more information. When Jacobson sent in for more information, the agent sent him a catalogue, and Jacobson ordered a magazine containing pornographic photographs of young boys engaged in various sexual activities.

Writing for the court, Justice White said:

> By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention the Government had directed at petitioner since January 1985.

*Id.*, 503 U.S. at 550.

In explaining how the government had induced Jacobson's readiness and willingness to purchase child pornography, the court said:

> [B]y waiving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against

censorship and the infringement of individual rights.

* * *

Petitioner's ready response to these solicitations cannot be enough to establish beyond a reasonable doubt that he was predisposed, prior to government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails. The evidence that petitioner was ready and willing to commit the offense came only after the Government had devoted 2 1/2 years to convincing him that he had or should have the right to engage in the very behavior proscribed by law. *Rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner.*

*Id.*, 503 U.S. at 552-53 (*emphasis added*).

Thus, while it previously had been well-understood that entrapment involved government inducement and an absence of predisposition, *Jacobson* made it clear that the government bears the burden of proving beyond a reasonable doubt that the defendant's predisposition "was independent and not the product of the attention that the Government directed at the [defendant]," *id.*, 503 at 550, and adopted a prophylactic rule requiring that the government prove that "the defendant was disposed to commit the criminal act prior to first being approached by government agents," *id.*, 503 U.S. at 553. *See also United States v. Fontenot*, 62 F.3d 1429 (10th Cir. 1995) (table), text on Westlaw, 1995 WL 462381 (the government must show

that the defendant was predisposed "prior to the initial contact by government agents"; "a defendant's criminal intent cannot evolve as interaction with the agent progresses"), *cert. denied*, 516 U.S. 1059 (1996); *United States v. Lessard*, 17 F.3d 303, 305-06 (9th Cir. 1994) (the instruction to the jury must make it clear that predisposition must exist prior to any contact with the government agent); *United States v. Hernandez*, 31 F.3d 354, 360 (6th Cir.) (defining predisposition as "defendant's state of mind before his initial exposure to government agents"), *cert. denied*, 513 U.S. 912 (1994); *United States v. Brown*, 43 F.3d 618, 624 (11th Cir.) (predisposition inquiry "asks the jury to consider the defendant's readiness and willingness to engage in the charged crime absence any contact with the government's officers or agents"), *cert. denied*, 516 U.S. 917 (1995); *United States v. Byrd*, 31 F.3d 1329, 1336 (5th Cir. 1994) ("[T]he crucial holding of *Jacobson* is that predisposition must be independent of government action"), *cert. denied*, 514 U.S. 1052 (1995); *United States v. Hollingsworth*, 27 F.3d 1196, 1201 (7th Cir. 1994) (*en banc*) ("We know from *Jacobson* that a criminal predisposition induced by government action cannot be used to defeat an entrapment defense"); *United States v. Loftus*, 992 F.2d 793, 797-98 (8th Cir. 1993) (holding that instruction asking whether defendant was predisposed "prior to the time you find he was induced to commit the crime" was erroneous); *United States v. Osborne*, 935 F.2d 32, 37 (4th Cir. 1991).

Here, the court of appeals said, "[a]lthough [*Jacobson*] requires that the defendant's predisposition be viewed at the time the government agent first approached the defendant, inferences about that predisposition may be

drawn from events occurring after the two parties came into contact." App. at 4 (citing *United States v. Duran*, 133 F.3d 1324, 1336 (10th Cir. 1998) (finding sufficient evidence of predisposition where defendant "bragged" to government informant "about being able to obtain drugs"), and *United States v. Mendoza-Salgado*, 964 F.2d 993, 1003 (10th Cir. 1992) ("[Defendant's] solicitous telephone discussions with [the government agent] regarding defendant's ability to supply cocaine, his express interest in handling future drug purchases and his attendance at the preliminary meeting between [his supplier] and agents exemplifies a profound eagerness to engage in the illegal activity.").

The court of appeals then found that there was sufficient evidence to prove that Garcia was predisposed to distribute narcotics because, after weeks in which Horcasitas had befriended Garcia, repeatedly complained about not having enough money, and let it be known that he was involved in drug dealing, Garcia was the first to mention drugs. The court of appeals also relied on the fact that, after months in which Horcasitas had been prodding Garcia to help find a cocaine supplier, Garcia understood thinly veiled code that Horcasitas used in telephone conversations.

By relying on conduct that occurred weeks and months after the government informant began his effort to involve Garcia in a drug transaction, the court of appeals' decision undermines the prophylactic principle established in *Jacobson*, which requires that there be proof beyond a reasonable doubt that the defendant was predisposed before he came in contact with the government

informant. The court of appeals' decision allows the government to do precisely what *Jacobson* prescribes: induce a willingness on the part of the defendant to become involved in a criminal transaction through contact with the defendant, then argue that the defendant is predisposed because of his ready response to a solicitation occurring long after the initial contact. *See Jacobson*, 503 U.S. at 553 ("ready response to these solicitations cannot be enough to establish beyond a reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime."); *Hollingsworth*, 27 F.3d at 1199 ("Had the Court in *Jacobson* believed that the legal concept of predisposition is exhausted in the demonstrated willingness of the defendant to commit the crime without threats or promises by the government, then Jacobson was predisposed, in which event the Court's reversal of his conviction would be difficult to explain. The government did not offer Jacobson any inducements to buy pornographic magazines or threaten him with harm if he failed to buy them. It was not as if the government had had to badger Jacobson for 26 months in order to overcome his resistance to committing a crime. He never resisted.").

Because the court of appeals' decision affects the way that the government conducts the innumerable sting operations that are part of its war on drugs and so thoroughly undermines the principles established in *Jacobson*, this court should grant certiorari to review that decision.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant the writ and to review the Judgment and Opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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October 5, 1999

**UNITED STATES of America,**
**Plaintiff-Appellee/Cross-Appellant,**

**v.**

**Eleuterio GARCIA,**
**Defendant-Appellant/Cross-Appellee.**

**Nos. 98-2012, 98-2031.**

United States Court of Appeals,
Tenth Circuit.

July 7, 1999.

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Before **PORFILIO, BALDOCK** and **EBEL**, Circuit Judges.

EBEL, Circuit Judge.

This appeal involves the defendant's challenge to the district court's denial of a motion for judgment of

acquittal based on an entrapment defense and denial of motions for a new trial, as well as the government's cross-appeals on several sentencing issues. We affirm the district court's judgment, except for the district court's two-level reduction based on the minor participant provision of the Sentencing Guidelines, on which we reverse and remand.

On December 14, 1995, Defendant-Appellant/Cross-Appellee Eleuterio Garcia was arrested for trafficking cocaine, and was later charged with possession of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 18 U.S.C. § 2. At trial, his sole defense was that paid government informant Saul Horcasitas entrapped him. The jury returned a guilty verdict, and Garcia's post-trial motions for judgment of acquittal and for a new trial were denied.

At sentencing, the district court adjusted downward Garcia's base offense level by six levels, pursuant to the safety valve, acceptance of responsibility, and minor participant provisions of the Sentencing Guidelines. The district court then departed downward an additional seven levels, finding Garcia's commission of the crime to be a single act of aberrant behavior. In total, Garcia's offense level dropped from twenty-eight to fifteen, which, when combined with his criminal history category of I, established a guideline imprisonment range of eighteen to twenty-four months. Garcia was sentenced to eighteen months in prison. The government cross-appeals the downward departure, as well as the acceptance of responsibility and minor participant adjustments.

I. *Entrapment as a Matter of Law*

Garcia argues that he was entrapped as a matter of law, and that the district court thereby erred in denying his motion for judgment of acquittal. The denial of a motion for judgment of acquittal based on entrapment is reviewed de novo, viewing all the evidence and drawing all reasonable inferences in the light most favorable to the government. *See United States v. Lampley*, 127 F.3d 1231, 1242 (10th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1098, 140 L.Ed.2d 153 (1998).

"Entrapment exists as a matter of law only if the evidence of entrapment is uncontradicted. When a jury has found that no entrapment existed, we can alter that finding on legal grounds only 'where the holding should be made without choosing between conflicting witnesses nor judging credibility. . . . Accordingly, we review only whether sufficient evidence exists to support the jury's verdict.' " *United States v. Martinez*, 979 F.2d 1424, 1429 (10th Cir.1992) (quoting *United States v. Dozal-Bencomo*, 952 F.2d 1246, 1250 (10th Cir.1991)) (citations omitted). Once the defense of entrapment is properly raised, the government has the burden of proving that the defendant was predisposed to commit the crime. *United States v. Duran*, 133 F.3d 1324, 1327 n. 2 (10th Cir.1998). The "entrapment defense has two parts: (1) the lawfulness of the government's conduct, and (2) the defendant's predisposition to engage in the criminal activity." *Lampley*, 127 F.3d at 1242. Garcia's claim of entrapment as a matter of law focuses on the second element, predisposition. Garcia contends that the government failed in its burden to prove that he was predisposed to commit a criminal act

prior to being approached by the government. "Predisposition to commit a criminal act may be shown by evidence of similar prior illegal acts or it may be inferred from defendant's desire for profit, his eagerness to participate in the transaction, his ready response to the government's inducement offer, or his demonstrated knowledge or experience in the criminal activity." *Duran*, 133 F.3d at 1335 (internal quotations and citations omitted). As a result, although *Jacobson v. United States*, 503 U.S. 540, 549, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992), requires that the defendant's predisposition be viewed at the time the government agent first approached the defendant, inferences about that predisposition may be drawn from events occurring after the two parties came into contact. *See Duran*, 133 F.3d at 1336 (finding sufficient evidence of predisposition where defendant, *inter alia*, "bragged" to the government informant "about being able to obtain drugs"); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1003 (10th Cir.1992) ("[Defendant's] solicitous telephone discussions with [the government agent] regarding defendant's ability to supply cocaine, his express interest in handling future drug purchases and his attendance at the preliminary meeting between [his supplier] and agents exemplifies a profound eagerness to engage in the illegal activity.").

We find there is sufficient evidence to prove that Garcia was predisposed to distribute narcotics. The government's paid informant, Saul Horcasitas, testified that three weeks after he moved into the trailer next door to Garcia, it was Garcia who first suggested to Horcasitas that he should sell cocaine. Additionally, Garcia's

vocabulary and manner of dealing with Horcasitas demonstrates knowledge and experience in illicit drug trades. During two taped telephone conversations between Garcia and Horcasitas, Garcia demonstrated knowledge of the drug trade when he understood Horcasitas' use of code words. Horcasitas talked to Garcia in code, using phrases like "animals" (cocaine), "bundles" (kilograms), and "papers" (money), and Garcia had no problem understanding Horcasitas' lingo. In fact, Garcia even used code words, stating in one conversation that he wanted to look "at the papers to see if I like them, to see if they work on the roof." Police Officer Mike Mulliniks testified that such code is used by people "familiar with dealing in drugs," and it is not unreasonable for a jury to find that someone who understands such code is predisposed to deal drugs. *See Mendoza-Salgado*, 964 F.2d at 1003 (" 'code words' to describe drugs and related matter further exemplifies . . . understanding of the narcotics trade").

Other evidence admitted at trial sufficiently establishes Garcia's predisposition. DEA Agent James Baker testified that the amount of cocaine involved in the transaction, 2.987 kilograms, is "consistent with more sophisticated operators." Moreover, Garcia had a conversation with Horcasitas in which Garcia refused to transport the cocaine from Las Cruces, New Mexico to Hatch, New Mexico. Garcia's refusal to transport the cocaine to Hatch from Las Cruces reasonably could be interpreted as evincing a sophisticated understanding of the risks of transporting drugs, because Border Patrol checkpoints are positioned between the two cities. Garcia also knew to ensure his security by insisting that the drug deal occur

on his home turf; that the transaction be completed quickly at the time Garcia, not the buyers, demanded; and that the locations for the drug deal frequently change. Finally, Garcia was apparently experienced enough to maintain a cool, calm, and collected businesslike demeanor throughout the entire drug transaction.

Given this evidence, and all reasonable inferences which can be drawn in the government's favor, the district court did not abuse its discretion in denying the motion for judgment of acquittal. A jury reasonably could find that the nearly three kilogram cocaine deal involving Garcia resembled a sophisticated drug transaction that someone predisposed to drug trafficking would commit.

II. *Motion for a New Trial*

Garcia filed a motion for a new trial on the ground that the verdict was against the weight of the evidence with regard to his sole defense of entrapment. The district court denied the motion, and Garcia appeals, arguing that the district court totally failed to weigh any evidence. A district court's denial of a new trial based on the weight of the evidence is reviewed for abuse of discretion. *United States v. Evans*, 42 F.3d 586, 593 (10th Cir.1994). Though the district court's reasoning could have been more explicit, the district court did not abuse its discretion.

A motion for new trial should be granted if, "after weighing the evidence and the credibility of the witnesses, the court determines that 'the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred.' " *United States v. Gabaldon*, 91

F.3d 91, 93-94 (10th Cir.1996) (quoting *Evans*, 42 F.3d at 593). In its Memorandum Opinion and Order denying the motion, the district court stated that it "considered the briefs, testimony of witnesses and [was] otherwise fully informed," and it then concluded that the motion for new trial was "not well taken." The court laid out in detail the testimony of Horcasitas, Agent Baker, and Officer Mulliniks, and ultimately found this testimony to be "directly relevant to the question of inducement and contradictory to Mr. Garcia's testimony." The court concluded that "[b]ecause of this conflict the Court cannot say that Mr. Garcia was entrapped as a matter of law." Although its reasoning was not explicit, we believe the district court weighed the evidence and considered the credibility of all the witnesses. The court's complete description of the evidence pertaining to the entrapment defense, its express consideration of "the briefs, testimony of witnesses and being otherwise fully informed," combined with the court's explicit rejection of the new trial motion establish that the court weighed the evidence, and found it not to support a motion for new trial. Accordingly, Garcia's appeal on this matter fails.

III. *Failure to Hold Hearing Regarding Potential Jury Misconduct*

Garcia also asserts that the district court erred in failing to conduct a hearing regarding potential jury misconduct. The denial of a motion for new trial based on juror misconduct is reviewed under the abuse of discretion standard. *See United States v. Davis*, 60 F.3d 1479, 1482 (10th Cir.1995).

Garcia alleges that several jurors saw him arrive at the courthouse in a recent model pickup truck and that they improperly inferred that to afford such an expensive vehicle, he must have been a drug dealer. Garcia argues that the jurors' observations of him arriving at the courthouse in a luxurious automobile constitutes external information triggering a presumption of prejudice under *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954).

*Remmer* dealt with a third party offer of a bribe to the jury foreman in exchange for a favorable verdict. The Supreme Court held that the trial court erred in not conducting a hearing with the participation of the defendant to determine the effect of the offered bribe on the jury, and stated: "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Id.* at 229, 74 S.Ct. 450. *Remmer's* presumption of prejudice does not apply to Garcia because the jurors' alleged observations of Garcia and his pickup truck do not constitute direct or indirect private "communication, contact, or tampering." Seeing Garcia arrive at court in his truck is not extraneous evidence, in the same way that it is not extraneous evidence when a juror observes the defendant walking down the corridor of the courthouse between trial dates, or sees the defendant at the grocery store. "To hold otherwise would require a *Remmer* hearing based on each of the multiple ordinary incidental contacts between non-sequestered jurors and virtually any other person during the course of a trial." *United States v. Brooks*, 161 F.3d 1240, 1246 (10th Cir.1998)

(holding *Remmer* inapplicable where juror spoke with security officers during lunch break on first day of trial, without evidence that their conversations were "about the matter pending before the jury"). *Remmer* and its applications in this Circuit thus foreclose us from adopting Garcia's arguments. We further observe that, in any event, photographs were introduced in evidence showing Garcia in this truck. The *Remmer* presumption is not applicable and the district court acted within its discretion in refusing to hold a hearing on the matter.

## IV. *The Government's Cross-Appeals from the Sentence*

The government raises three issues on cross-appeal. The government contends that the district court erred in adjusting Garcia's sentence downward based on his acceptance of responsibility and minor participant status in the offense. The government also argues that the district court erred in granting a downward departure for aberrational behavior. We hold that the district court erred only in its minor participant downward adjustment; therefore, we affirm in part and reverse in part.

### *A. Acceptance of responsibility*

At sentencing, the district court granted Garcia a two point reduction for acceptance of responsibility. The court made a factual finding that:

> The defendant meets the criteria of Section 3E1.1(a) and will receive a two (2) level reduction for acceptance of responsibility. . . . The defendant admitted his involvement in the offense since his initial arrest and throughout

> the trial. Further, the defendant has given the Government all the information he knows about the offense. The Court finds it was appropriate for the defendant having presented an entrapment defense which admitted the underlying facts, to receive full credit for acceptance of responsibility.

On cross-appeal, the government argues that the district court erred as a matter of law in applying the acceptance-of-responsibility credit under U.S.S.G. § 3E1.1 because Garcia went to trial, asserted an entrapment defense, and thereby, according to the government, refused to acknowledge that he willfully engaged in drug trafficking. The issue before us is whether asserting an entrapment defense at trial bars receipt of an acceptance-of-responsibility reduction as a matter of law. The circuits appear split on this matter,[1] although only the Sixth

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[1] The Third, Sixth, Ninth, and Eleventh Circuits have concluded that the entrapment defense and the acceptance of responsibility reduction are not necessarily incompatible. *See United States v. Demes*, 941 F.2d 220, 222 (3d Cir.1991) ("[I]t is conceivable to hypothesize a case in which a plea of entrapment would not be inconsistent with the acceptance of responsibility. . . . "); *United States v. Fleener*, 900 F.2d 914, 918 (6th Cir.1990) ("[W]e find that the district court did not err in considering a reduction for acceptance of responsibility even though [the defendant] raised an entrapment defense at trial. Such a defense is no less inconsistent with the Guidelines provision than is a plea of not guilty, which does not raise an absolute bar to a court's consideration."); *United States v. Ing*, 70 F.3d 553, 556 (9th Cir.1995) ("The assertion of an entrapment defense is not necessarily incompatible with acceptance of responsibility."); *United States v. Davis*, 36 F.3d 1424, 1435 (9th Cir.1994) ("[T]he district court could not have found that [the defendant] had not accepted responsibility solely because he

Circuit has addressed the issue in a case with the same posture as here: an appeal from a sentencing court's *grant*

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presented an entrapment defense at trial."); *Joiner v. United States*, 103 F.3d 961, 963 (11th Cir.) ("[The defendant] would not have been barred as a matter of law from receiving an adjustment merely because he asserted an entrapment defense at trial, even though some courts have viewed the assertion of an entrapment defense as the virtual antithesis of acceptance of responsibility. Rather, as with cases involving any other defense, whether a defendant has accepted responsibility is a fact-based question which requires the district court to carefully review all of the evidence bearing on a particular defendant's contrition.") (citation omitted), *cert. denied*, 520 U.S. 1246, 117 S.Ct. 1857, 137 L.Ed.2d 1058 (1997). The First Circuit seems to have reached the same conclusion. *See United States v. Ellis*, 168 F.3d 558, 564 (1st Cir.1999) ("In some cases, defenses relating to intent may yet qualify for the acceptance of responsibility reduction.") (citing *Fleener*, 900 F.2d at 918).

On the other hand, the Fifth and Eighth Circuits have held that an entrapment defense and a § 3E1.1 reduction are necessarily incompatible. *See United States v. Brace*, 145 F.3d 247, 265 (5th Cir.) (en banc) ("[A]n entrapment defense is a challenge to criminal intent and thus to culpability. Accordingly, this is not one of those 'rare situations', contemplated by the guideline commentary, in which a defendant may proceed to trial and still satisfy § 3E1.1(a)."), *cert denied*, ___ U.S. ___, 119 S.Ct. 426, 142 L.Ed.2d 347 (1998); *United States v. Chevre*, 146 F.3d 622, 625 (8th Cir.1998) ("We believe that '[w]here a defendant persists in asserting entrapment, she cannot also claim acceptance of responsibility.' ") (quoting *United States v. Simpson*, 995 F.2d 109, 112 (7th Cir.1993)).

The D.C. Circuit comes very close to holding that the entrapment defense is incompatible with acceptance of responsibility, but it has left the door just slightly ajar on that issue. *See United States v. Kirkland*, 104 F.3d 1403, 1406 (D.C.Cir.) ("It may be that a situation could be presented in which an entrapment defense is not logically inconsistent with a finding of a defendant's acceptance of responsibility, even though we

of the reduction. *See United States v. Fleener*, 900 F.2d 914 (6th Cir.1990) (affirming the district court's decision to grant a two-point reduction for acceptance of responsibility because of the defendant's pretrial cooperation with the government on the merits of the offense, notwithstanding the defendant's assertion at trial of an

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doubt it (that three of our sister circuits seem to think so is sufficient reason to be somewhat cautious), but certainly defense counsel's argument before the district court did not raise it."), *cert. denied*, 520 U.S. 1246, 117 S.Ct. 1857, 137 L.Ed.2d 1059 (1997).

The Seventh Circuit appears to be split internally. *Compare United States v. Corral-Ibarra*, 25 F.3d 430, 440 (7th Cir.1994) (finding that an entrapment defense if pleaded in good faith "may possibly qualify" for a § 3E1.1 reduction, but in such a case "a determination that a defendant has accepted responsibility will be based *primarily* upon *pre-trial* statements and conduct"), *with United States v. Rector*, 111 F.3d 503, 508 (7th Cir.1997) ("[T]he adjustment [for acceptance of responsibility] is rarely available to those who assert entrapment, a defense that by its nature tends to preclude the acceptance of responsibility. Essentially, the problem is that asserting entrapment is a denial rather than an acceptance of responsibility. A defendant asserting such a defense is saying, in effect, 'I did it but it was somebody else's fault that I did it.' That is the antithesis of remorse or acceptance of responsibility."), *overruled on other grounds by United States v. Wilson*, 169 F.3d 418, 428 n. 9 (7th Cir.1999), *cert. denied*, 119 S.Ct. 2383 (U.S. 1999), *and United States v. Simpson*, 995 F.2d 109, 112 (7th Cir.1993) ("Where a defendant persists in asserting entrapment, she cannot also claim acceptance of responsibility."), and *United States v. Emenogha*, 1 F.3d 473, 482 (7th Cir.1993) (same).

The Second Circuit has noted, but has yet to address the issue. *See United States v. Rosa*, 17 F.3d 1531, 1552 (2d Cir.1994) (expressly refusing to determine "whether a defendant who claims 'sentencing entrapment' may ever receive the two-point reduction").

entrapment defense). Like the Sixth Circuit, we hold that a § 3E1.1 reduction is not per se unavailable just because the defendant chooses to go to trial solely on an entrapment defense.

The entrapment defense is founded upon the rule of statutory construction that prohibits literal interpretation of a statute that produces absurd results. In *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932), where the Supreme Court first recognized the entrapment defense, the government's argument against recognition of the entrapment defense was tied to the "letter of the statute" under which the defendant was prosecuted. *Id.* at 446, 53 S.Ct. 210. The Supreme Court, however, rejected a literal reading of the criminal statute, and explained:

> Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned. . . .
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> * * *
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> We think that this established principle of construction is applicable here. We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.

*Id.* at 446-48, 53 S.Ct. 210. Thus, the entrapment defense is a creature of statutory construction that concedes that the defendant's conduct satisfies the essential factual elements of guilt, but nonetheless refuses to apply the statute to an entrapped defendant to avoid creating an absurd result. *See also Jacobson*, 503 U.S. at 553, 112 S.Ct. 1535 (reaffirming quoted passage from *Sorrells*); *Sherman v. United States*, 356 U.S. 369, 372, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) ("Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."); *United States v. Russell*, 411 U.S. 423, 428, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) ("[In *Sorrells*,] Mr. Chief Justice Hughes, speaking for the Court, held that as a matter of statutory construction the defense of entrapment should have been available to the defendant."); *id.* at 433-34, 93 S.Ct. 1637 ("Critics of the rule laid down in *Sorrells* and *Sherman* have suggested that its basis in the implied intent of Congress is largely fictitious. . . . Arguments such as these, while not devoid of appeal, have been twice previously made to this Court, and twice rejected by it, first in *Sorrells* and then in *Sherman*."); Ronald J. Allen et al., Constitutional Criminal Procedure 980 (3d ed. 1995) ("[T]he Court has consistently reaffirmed that the key to the federal entrapment defense is the absence of predisposition on the part of the defendant and that the defense exists as a matter of statutory construction.").

Given that the entrapment defense emanates from such a rule of statutory construction, we believe that a sentencing court may apply an acceptance-of-responsibility reduction to a defendant who asserts the entrapment defense. The commentary to § 3E1.1 states that

conviction by trial "does not automatically preclude a defendant from consideration for such a reduction." U.S.S.G. § 3E1.1, cmt. (n.2).

> In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or *a challenge to the applicability of a statute to his conduct*). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

*Id.* (emphasis added). As the long line of Supreme Court entrapment cases show, the entrapment defense is just such a "challenge to the applicability of a statute" to the defendant's conduct. The defendant, when defending at trial based only on the entrapment defense, is essentially saying: "I am factually guilty, but it was the government that induced commission of the crime and planted the criminal intent. I thereby was entrapped. Therefore, Congress did not intend for this criminal statute to apply to my conduct." Thus, the entrapment defense is one of those "rare situations" contemplated by the Sentencing Guidelines in which a defendant may go to trial and still receive an acceptance of responsibility reduction.

We are mindful of this court's prior statement in *United States v. Hansen*, 964 F.2d 1017, 1021 (10th Cir.1992), that it is "difficult for this Court to envision how the defendant argues that he affirmatively accepted responsibility for his criminal action when throughout

the proceedings he maintained that his criminal action was not his fault, but rather, it was the result of government inducement." Nothing we say today is inconsistent with this statement. We hold only that raising the entrapment defense does not *necessarily* foreclose the possibility of receiving a reduction for acceptance of responsibility, but that does not mean that the simple assertion of the entrapment defense coupled with acknowledgment of the underlying criminal activity automatically entitles a defendant to a two-point acceptance of responsibility reduction. *See also United States v. Hoenscheidt*, 7 F.3d 1528, 1532 (10th Cir.1993) (no error where sentencing court acknowledged the entrapment defense "does not necessarily bar" a § 3E1.1 reduction); *United States v. Wallace*, 133 F.3d 933 (10th Cir. 1998) (unpublished) ("[I]t is possible that a failed entrapment defense could coexist with an acceptance of responsibility adjustment."), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1855, 140 L.Ed.2d 1103 (1998); *United States v. Ortegon-Antillon*, 65 F.3d 179 (10th Cir. 1995) (unpublished) ("A defendant who forces the government to prove its case at trial will only rarely warrant a reduction for acceptance of responsibility. One such rare occasion may arise when a defendant who otherwise expresses remorse, contrition, or acknowledgment of wrongdoing nonetheless pleads not guilty because of entrapment.") (citation omitted). A defendant will need to evidence acceptance of responsibility, primarily through pre-trial statements and conduct, before an acceptance of responsibility reduction would be warranted. *See* U.S.S.G. § 3E1.1, cmt. 2.

Some courts have suggested that the entrapment defense and U.S.S.G. § 3E1.1 are incompatible because the

entrapment defense challenges the factual element of intent. *See United States v. Brace*, 145 F.3d 247, 265 (5th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 119 S.Ct. 426, 142 L.Ed.2d 347 (1998); *United States v. Kirkland*, 104 F.3d 1403, 1405 (D.C.Cir.), *cert. denied*, 520 U.S. 1246, 117 S.Ct. 1857, 137 L.Ed.2d 1059 (1997). Entrapment is indeed "intertwined" with the issue of intent, *United States v. Fadel*, 844 F.2d 1425, 1430 (10th Cir.1988), because the jury is asked to consider "whether that intent was the result of Government inducement," *Mathews v. United States*, 485 U.S. 58, 65, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988). However, asking whether the defendant's intent was the result of government inducement does not challenge the factual element of intent. As the Supreme Court has clearly stated, "[entrapment] is rooted . . . in the notion that Congress could not have intended criminal punishment for a defendant who has committed *all the elements of a proscribed offense*, but was induced to commit them by the Government." *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) (emphasis added); *see also*, Ronald J. Allen et al., Constitutional Criminal Procedure 999 (3d ed. 1995) ("Typically defendants claiming entrapment do not challenge the prosecutor's proof of the elements of the offense."). In this case, Garcia was charged with possession of cocaine with intent to distribute. "To support a conviction of possession with intent to distribute, the evidence must prove beyond a reasonable doubt the following elements: (1) the defendant knowingly possessed the illegal drug; and (2) the defendant possessed the drug with the specific intent to distribute it." *United States v. Carter*, 130 F.3d 1432, 1440 (10th Cir.1997) (internal quotations omitted), *cert. denied*, ___

U.S. ___, 118 S.Ct. 1856, 140 L.Ed.2d 1104 (1998). The entrapment defense challenges neither of these elements. Garcia admits that he knowingly possessed cocaine and that he specifically intended to distribute the cocaine. Instead, Garcia asserted the entrapment defense, which functions as an "origin-of-intent" defense, conceding that he had the requisite criminal intent when the crime was committed, but claiming that the requisite criminal intent was planted by the government. If it is proven that the government "originate[d] a criminal design, implant[ed] in an innocent person's mind the disposition to commit a criminal act, and then induce[d] commission of the crime," *Jacobson*, 503 U.S. at 548, 112 S.Ct. 1535, then pursuant to a rule of statutory construction, the criminal statute does not apply to the defendant, and he or she should therefore not be punished.[2]

Even if the entrapment defense were viewed as challenging the factual element of intent, under the law of this circuit, we would still affirm the district court's acceptance-of-responsibility downward adjustment. In *United States v. Gauvin*, 173 F.3d 798 (10th Cir.1999), the defendant was charged with assault with a dangerous

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[2] The record belies any suggestion that Garcia "admit[ted] and expresse[d] remorse" only after conviction. U.S.S.G. § 3E1.1, comment. (n.2). The sentencing court found that Garcia "admitted his involvement in the offense since his initial arrest." Likewise, at the evidentiary hearing and sentencing below, the judge added: "I think Mr. Garcia is entitled to acceptance of responsibility by virtue of the fact that he has at all times admitted the acts that he has been accused of by the Government in this case . . . Mr. Garcia has at all times admitted what he did in this case. He admitted it prior to trial."

weapon and assault on a federal officer. The defendant "went to trial only to contest the legal element of intent. . . . [The defendant] disputed whether his acknowledged factual state of mind met the legal criteria of intent to harm or cause apprehension." *Id.* at 806. He argued at trial, to no avail, that "he did not intend, while drunk and scared, to cause injury to others. [He also] contended that his drunkenness rendered him incapable of forming the requisite mens rea." *Id.* The defendant was convicted, but the district court granted him a § 3E1.1 reduction. We affirmed, reasoning that the defendant's "defense – essentially a challenge to the applicability of the statute to his conduct, *see* U.S.S.G. § 3E1.1, cmt. n. 2 – does not as a matter of law preclude application of the guideline." *Id.* If an intoxication defense challenging the mens rea of a crime does not necessarily foreclose an acceptance-of-responsibility reduction, then neither does an entrapment defense. Accordingly, the district court's ruling was consistent with the law and it committed no error in granting Garcia a § 3E1.1 downward adjustment.

*B. Minor participant*

The trial court granted Garcia a two level reduction from the base offense level because he was a "minor participant." The court explained:

> [T]he defendant is viewed as a minor participant. The defendant was recruited by a paid informant who befriended the defendant and his pregnant daughter for several months with the goal to ensnare him in this illegal activity and who preyed on the defendant's sympathy

for the paid informant's seemingly impoverished lifestyle.

A trial court's determination as to whether a defendant was a minimal or minor participant is a factual finding that we review only for clear error, "giving due deference to the court's application of the sentencing guidelines to the facts." *United States v. James*, 157 F.3d 1218, 1219 (10th Cir.1998). This court "will not reverse the district court unless the court's findings are without factual support in the record, or if after reviewing the evidence we are left with the definite and firm conviction that a mistake has been made." *United States v. Gault*, 141 F.3d 1399, 1404 (10th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 253, 142 L.Ed.2d 208 (1998). After reviewing the evidence, we are indeed left with a definite and firm conviction that a mistake has been made.

Section 3B1.2 states that the trial court should decrease the defendant's offense level by two levels "[i]f the defendant was a minor participant in any criminal activity." "[M]inor participant means any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, cmt. (n.3). "A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted," but does not include an undercover law enforcement officer. U.S.S.G. § 3B1.1, cmt. (n. 1). The three "participants" in Garcia's crime were Garcia and the two men who delivered the cocaine to Garcia, Rafael Chavez and Dagoberto Torrez, in order for him to sell it to the government's undercover buyers. It would be a mistake to conclude both that Garcia is less culpable

than Chavez and Torrez, and that Garcia's role was minimal. Chavez and Torrez were the suppliers of the cocaine, and Garcia was the seller who took the active step of contacting the suppliers to arrange the drug deal. We find it clear error to conclude that a seller of nearly three kilograms of cocaine who helped orchestrate its sale by contacting suppliers was a "minor participant." The fact that the government "preyed" on Garcia's sympathy does not diminish his substantial role in the cocaine transactions at issue.[3]

C. *Aberrant behavior*

At sentencing, the district court granted a downward departure to Garcia because his crime of conviction was a single act of aberrant behavior. The district court explained:

> The Court finds that this defendant has a minimal criminal history. The defendant has numerous letters of support from the community attesting to his honesty and integrity in the

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[3] Garcia contends that he was a "minor participant" because it was the government and one of the suppliers that "set the price of the cocaine, not Garcia; that Garcia did not arrange the location; that Garcia did not supply the cocaine, did not know the purity of the drugs, and did not have any control over the amount of the drugs that were purchased; and that Garcia did not stand to receive any financial gain from the transaction and got involved only because of the friendship he felt toward Horcasitas." However, this argument, assuming it to be true, fails to rebut the facts outlined above, which clearly establish that Garcia's role was nevertheless not minimal. *See* U.S.S.G. § 3B1.2, cmt. (n.3). While Garcia may not have run every facet of the drug deal, his role within it was still substantial.

> manner which he conducted his business in Las Cruces, New Mexico for many years. Several letters confirmed the defendant's sympathy for people in need. The paid informant used this to entice this previously law-abiding member of the community. The Court will depart seven (7) levels, from a base offense level of twenty-two (22), to a base offense level of fifteen (15). A base offense level of fifteen (15) and a criminal history category of I establishes a guideline imprisonment range of eighteen (18) to twenty-four (24) months.

"The aberrance of a criminal act is an encouraged factor for departure." *United States v. Talk*, 158 F.3d 1064, 1072 (10th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1079, 143 L.Ed.2d 81 (1999). "Under our case law, the aberrant nature of a criminal defendant's offense conduct may properly be considered as a mitigating factor in a downward departure decision." *United States v. Jones*, 158 F.3d 492, 500 (10th Cir.1998). The "determination of whether an individual defendant's offense conduct is aberrational, like the decision to depart, requires consideration of unique factors not readily susceptible of useful generalization. The district court is in the better position to determine whether the defendant's offense conduct is out of character for that individual. Accordingly, the district court's resolution of this largely factual question is due substantial deference." *Id.*

The government argues that in order for the aberrational behavior departure to apply, the offense must be "spontaneous, without substantial planning, and be completely aberrant from defendant's background and personality." As a result, the government asserts, Garcia's

"carefully planned" cocaine transaction cannot be deemed aberrational. However, this circuit has never held that application of the aberrant behavior downward departure requires the crime at issue to have been spontaneous. This court focuses "our departure analysis not on the number of discrete acts undertaken by the defendant, but on '[t]he aberrational character of her conduct.' " *Id.* (quoting *United States v. Pena*, 930 F.2d 1486, 1495 (10th Cir.1991)). In *Jones*, this court upheld a downward departure based on the aberrance of a criminal act where a defendant was convicted of possession of a firearm by a prohibited person and providing false information to obtain a firearm. In *Pena*, a downward departure due to the aberrational nature of the defendant's conduct was affirmed where the defendant was convicted of driving a car containing drugs across the border. Neither of the facts in *Jones* nor *Pena* evince spontaneity – what the government posits as a prerequisite to the aberrational behavior factor for a downward departure.

The government also argues on appeal that the jury's rejection of the entrapment defense necessarily amounts to a finding that Garcia was predisposed to commit the offense, and that such predisposition precludes the aberrational behavior downward departure. This argument, however, was not raised below and is unpersuasive, in any event, since the jury, in rejecting the entrapment defense, did not have to find Garcia predisposed; rather, the jury, in rejecting the entrapment defense, could simply have found no inducement by the government.

As a result, the district court's downward departure based on aberrant behavior is affirmed.

## CONCLUSION

We AFFIRM the district court's denial of Garcia's motion for judgment of acquittal and motions for a new trial. We also AFFIRM the district court's application of the acceptance-of-responsibility downward adjustment and aberrant behavior downward departure. The district court's application of the "minor participant" provision is REVERSED, and we REMAND for resentencing in accordance with this opinion.